109-278

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~305~~ 60

WILLIAM R. GRACE, MICHAEL P. GRACE, AND CHARLES R. FLINT, PLAINTIFFS IN ERROR,

vs.

THE AMERICAN CENTRAL INSURANCE COMPANY OF SAINT LOUIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 305.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND CHARLES R. FLINT, PLAINTIFFS IN ERROR,

vs.

THE AMERICAN CENTRAL INSURANCE COMPANY OF SAINT LOUIS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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1 *Summons.*

Supreme court, Kings Co.

WILLIAM R. GRACE, MICHAEL P. GRACE, & Charles R. Flint, plaintiffs,
against
THE AMERICAN CENTRAL INSURANCE COMPANY of Saint Louis, defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated January 22nd, 1878.

BRITTON & ELY, *Plaintiffs' Attorneys.*

Post-office address, Brooklyn, N. Y.; office, No. 44 Court street, Brooklyn, N. Y.

2 Supreme court, county of Kings.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND Charles R. Flint, plaintiffs,
against
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis, defendants.

Said plaintiffs complain of said defendants and allege:

I. That the plaintiffs are, and at the times hereinafter mentioned were, copartners in business at the city of New York, under the firm-name and style of W. R. Grace and Company, and are doing business in this State, and the said William R. Grace and Charles R. Flint are residents of this State.

II. That the defendants are, and at the times hereinafter mentioned were, a foreign corporation, and, as the plaintiffs allege upon information and belief, duly incorporated under and by the laws of the State of Missouri and duly authorized to do business in this State and to make the contract hereinafter mentioned.

III. That on the 26th day of September, 1877, the defendants, in consideration of fifty-five dollars, made their policy of insurance
3 in writing, and thereby insured said plaintiffs, under their said firm-name of W. R. Grace and Company, for one year, from the 26th day of September, 1877, to the 26th day of September, 1878, at twelve o'clock at noon, against loss or damage by fire, to the amount of fifty-five hundred dollars, on their lumber and timber of all kinds, their own or held by them in trust or on commission, or sold but not delivered, all contained in their warehouses, yards, adjoining sheds, bulkheads, sidewalks, and premises adjoining, all situate on Newtown Creek, Hunter's Point, Long Island; and the said defendants thereby agreed to make good unto the said

plaintiffs, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured above specified, nor the interests of the plaintiffs in said property, except as therein provided, as shall happen by fire to said property, the amount of loss or damage to be ascertained according to the actual cash value of the property at the time of the loss; and in case of other insurance upon the property thereby insured, the plaintiffs to be entitled to recover of the defendants no
4 greater proportion of the loss sustained than the sum thereby insured bears to the whole amount insured on said property.

IV. That at the time of making said insurance, and from thence until *until* the fire hereinafter mentioned, the plaintiffs had an interest in the property insured as the owners thereof to an amount exceeding the amount of said insurance.

V. That on the 7th day of October, 1877, said insured property was totally destroyed by fire, which fire did not happen by, through, or in consequence of any of the causes or means excepted in said policy, and that said loss and damages, estimated according to the actual cash value of the property at the time of said loss, exceed the whole amount of insurance on said property at the time said loss and damage occurred; but the plaintiffs claim to be due from the defendants and to recover herein the principal sum of $5,157.37 only.

VI. That the plaintiffs have duly given to the defendants the notice and proofs of said fire, loss, and damage required by said policy, and have duly performed all the conditions of said policy on the part of the plaintiffs to be performed to entitle them by the terms of said policy to
5 recover thereon against said defendants for said loss and damage, and that said plaintiffs have duly demanded payment of said sum of fifty-one hundred and fifty-seven dollars and thirty-seven cents from said defendants.

VII. That no part of said sum has been paid, and that the whole of said sum is now due on said policy from said defendants to said plaintiffs.

Wherefore said plaintiffs demand judgment against said defendants for the sum of five thousand one hundred and fifty-seven dollars and thirty-seven cents, with interest thereon from the 15th day of December, 1877, and the costs of this action.

BRITTON & ELY,
Plaintiffs' Attorneys, 44 Court st., Brooklyn.

CITY & COUNTY OF NEW YORK, *ss:*

Charles R. Flint, being duly sworn, says that he is one of the above-named plaintiffs, and that the foregoing complaint is true to his own knowledge, except as to the matters therein stated to be alleged upon
6 information and belief, and as to those matters that he believes it to be true.

CHARLES R. FLINT.

Sworn to before me January 22nd, 1878.

ROBERT E. TIBBITS,
Notary Public, Queens Co., Act'g in N. Y.—Ctf. filed.

(Endorsed:) Supreme court. William R. Grace & others agst. The American Central Insurance Company of St. Louis. Complaint. G. Britton & Ely, pl'ffs' att'y.

7 Supreme court.

William R. Grace, Michael P. Grace, & Charles R. Flint
against
The American Central Insurance Company of Saint Louis.

The answer of the defendant to the complaint herein.

First. The defendant admits its incorporation as alleged, and the copartnership of plaintiff; and defendant admits and alleges, upon information and belief, that on or about the 26th day of September, 1877, the defendant did, by its agent, deliver to an agent of plaintiffs a policy of insurance similar to that described in the complaint, which was to be held by said agent of plaintiffs or by said plaintiffs subject to the approval of the defendant or subject to its willingness to carry the risk covered by said policy; that defendant's officers were thereupon advised by their said agent of the particulars and character of said risk, and defendant there-
8 upon forthwith disapproved of the same, and caused due notice of such disapproval and of defendant's unwillingness to carry such risk to be forthwith, and before said fire, given to the said agents of plaintiffs, through whom all of said business had been done, and also gave said plaintiffs, through their said agents, notice that defendant had cancelled said policy upon the books of said company, and at the same time demanded that said policy be delivered up to said company; that said agents of plaintiffs accepted such notice, agreed in behalf of plaintiffs that said policy was no longer of any binding effect, and promised at once to return the same to said defendants or its said agent; that no premium for insurance had ever been paid on account of said policy, and said policy never had any binding effect upon defendant.

And defendant, further answering, alleges that it has no knowledge or information sufficient to form a belief as to the interest of plaintiffs
9 in the property referred to, nor as to the extent of the destruction or damages sustained by the fire alleged, nor as to the cause of said fire, but defendant admits that it has not paid any part of said loss. And defendant denies each and every allegation in said complaint not herein expressly admitted.

Second. And for a further and separate defence to said action defendant alleges that it was provided in and by the terms and conditions of the policy mentioned in said complaint, amongst other things, and it was therein and thereby agreed and declared, on the part of both parties thereto, that defendant should not be liable, by virtue of said policy or any renewal thereof, until the premium therefor should be actually paid; and defendant alleges that in fact no part of said premium was ever paid or tendered by said plaintiffs before the occurrence of said fire, by reason whereof no liability ever attached to defendant on account of said policy.

Third. And for a further and separate defence this defendant alleges that it was provided in and by the terms and conditions of the policy
10 of insurance mentioned in said complaint, an' in reference to which said policy was made and accepted, amongst other things, as fol-

lows: That the insurance secured by said policy might be terminated at the option of the defendant, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy; that plaintiffs never paid any premium upon said policy; that on or about the fifth day of October, 1877, defendant exercised its said option to cancel said policy, and gave due notice of such exercise of its said option and of such cancellation to the plaintiffs or their agents.

GEORGE W. PARSONS,
Def't's Attorney.

CITY AND COUNTY OF NEW YORK, *ss:*

John D. Carroll, being duly sworn, says that he is the local agent of the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true
11 of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that his knowledge and the grounds of belief are the issuing by him of the policy described in the complaint, and facts acquired and known by him in the performance of all the business connected with the insurance; that the reason why this verification is not made by the defendant is that it is a foreign corporation, created under and by the laws of the State of Missouri, and that none of its officers are now within this county or State.

Sworn to before me this day of February, 1878.

(Endorsed:) Due and sufficient service of a copy of the within answer is hereby admitted.

Brooklyn, February 12th, 1879.

BRITTON & ELY, *Pl'ffs' Att'ys.*

12 Supreme court.

WILLIAM R. GRACE & OTHERS, PLAINTIFFS,
against
THE AMERICAN CENTRAL INSURANCE COMPANY, DEFENDANT.
} Affidavit of merits.

CITY AND COUNTY OF NEW YORK, *ss:*

John Mulville, being duly sworn, says that he is general agent of the defendant in the above-entitled action, and that he has fully and fairly stated the case in the above action to George W. Parsons, defendant's counsel in this action, who resides in said city of New York, in the said county of New York, and that defendant has a good and substantial defence upon the merits thereof, as he is advised by defendant's said counsel after such statements made as aforesaid, and verily believes to be true.

JOHN MULVILLE.

Sworn to before me this eighteenth day of February, 1878.

JAMES W. HOWIE,
Notary Public (135), *N. Y. Co.*

13 (Indorsed:) Supreme court. William R. Grace & others against The American Central Insurance Co. Copy aff. of merits. Geo. W. Parsons, def't's att'y. To Britton & Ely, pl'ffs' att'ys.

14 N. Y. supreme court.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND Charles R. Flint
against
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

To the honorable the supreme court of the State of New York:

The petition of The American Central Insurance Company of St. Louis, in the State of Missouri, respectfully shows:

That your petitioner is the defendant in this suit, and that the same was brought by the said William R. Grace, Michael P. Grace, and Charles R. Flint, as copartners under the firm-name of W. R. Grace and Company, on or about the twenty-third day of January, 1878, in the supreme court of the State of New York for the county of Kings; and that said W. R. Grace and Company were at the time said cause of action arose, and now are, doing business in this State under the said firm-name; and
15 that said William R. Grace and Charles R. Flint, two of said firm, as your petitioner is informed and believes, reside in this State; and said Michael P. Grace is a resident of some State or country unknown to defendant, but other than the State of Missouri; and that the cause of action involved in this suit belongs to said copartnership.

That your petitioner is, and was at the time of bringing this suit, a citizen of the State of Missouri; and your petitioner further respectfully shows that there is, and was at the time when this action was brought, a controversy therein between citizens of different States; and, further, that the said plaintiffs claim in the complaint in this action as damages against your petitioner the sum of five thousand one hundred and fifty-seven dollars and thirty-seven cents, with interest thereon from December fifteenth, 1877, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs; that this action has not been tried, but is now pending for trial in the county of Kings, and that there has been no term of this court at which said cause could be tried since issue was joined therein,
16 and that your petitioner desires to remove this suit before trial thereof into the next circuit court of the United States for the eastern district of New York, being the district where said suit is pending, in the second circuit, in pursuance of the Revised Statutes of the United States and of the act of Congress entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from said courts, and for other purposes," approved March 3rd, 1875.

And that your petitioner is ready and willing to make and file herewith a bond, with good and sufficient surety, for its entering in such circuit court, on the first day of its session next after the filing of this petition and after the order of this court removing said suit to the said circuit court, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such cause was wrongfully or improperly removed thereto, and for doing all other things required to be done by the said statutes in such case made and provided; and it offers herewith its bond, executed by Louis

17 Monrose, of the city, county, and State of New York, and John Mulville, of the city of Brooklyn, county of Kings, and State aforesaid, as sureties, in the penal sum of one thousand dollars, conditioned that your petitioner shall enter in such circuit court, on the first day of its session next after the filing of this petition and the order removing said suit to the said circuit court, a copy of the record in said suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and for doing such other proper acts as by the statutes of the United States in such cases made and provided are required to be done; and your petitioner therefore prays that the said bond be accepted as good and sufficient surety according to said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the eastern district of New York, in the second circuit, pursuant to the statute made and provided, and that no further proceedings may be had therein in this court.

And your petitioner will ever pray, &c.

Dated February 15th, 1878.

AMERICAN CENTRAL INS. CO.,
By GEORGE T. CRANE, *Pres't.*

18 GEORGE W. PARSONS,
Attorney for Petitioner.

STATE OF MISSOURI,
City of St. Louis:

George T. Crane, being duly sworn, deposes and says that he is the president of the petitioner named in the foregoing petition; that he has read the petition subscribed by said petitioner, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE T. CRANE.

Subscribed and sworn to before me this 15th day of Febr'y, 1878.
[SEAL.] JOHN W. HODGKIN,
Commissioner for the State of New York, Resident at St. Louis, Missouri.

(Endorsed:) Supreme court. William R. Grace & others ag'st The American Central Insurance Company of St. Louis. Petition. George W. Parsons, def't's att'y.

19 N. Y. supreme court.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND Charles R. Flint
against
THE AMERICAN CENTRAL INSURANCE COMPANY of Saint Louis.

We, The American Central Insurance Company of Saint Louis, in the State of Missouri, as principal, and Louis Monrose, of the city, county,

and State of New York, and John Mulville, of the city of Brooklyn, county of Kings, and State of New York, as sureties, are held and firmly bound unto William R. Grace, Michael P. Grace, and Charles R. Flint, comprising the firm of W. R. Grace and Company, of the county of Kings and State of New York, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said William R. Grace, Michael P. Grace, and Charles R. Flint, or their assigns, for which payment well and truly to be made we hereby bind ourselves, our successors, heirs, executors, and adminsistrators, firmly by these presents. Sealed
20 with our seals. Dated the fifth day of February, 1878.

Whereas a suit was brought on or about the twenty-third day of January, one thousand eight hundred and seventy-eight, in the supreme court of the State of New York for the county of Kings, by the said William R. Grace, Michael P. Grace, and Charles R. Flint against the said American Central Insurance Company of St. Louis, and the same is now pending for trial in said county of Kings, and is removable into the circuit court for the eastern district of New York, in the second circuit, under the Revised Statutes of the United States, under the act entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March 3rd, 1875; and whereas the said American Central Insurance Company of St. Louis has filed its petition in the said supreme court of the State of New York for the removal of said suit into the next circuit court to be held in the eastern district of New York, pursuant to the said statutes of the United States in such cases made
21 and provided:

Now, therefore, the condition of this obligation is such that if the above-bounden The American Central Insurance Company of St. Louis, or its successors, shall enter, or cause to be entered, in the circuit court of the United States for the eastern district of New York, on the first day of its stated session next ensuing after the filing of the said petition and after the order of the said supreme court of the State of New York for the removal of said suit into the said circuit court, a copy of the record in said suit, and for paying all costs that may be awarded if the said suit was wrongfully or improperly removed thereto, or cause to be done such other appropriate acts as by the said Revised Statutes of the United States are required to be done upon the removal of a suit into the United States circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

[CORPORATE SEAL OF CO.]

AMERICAN CENTRAL INS. CO.,
By GEORGE T. CRANE, *Pres't.*
LOUIS MONROSE. [L. S.]
JOHN MULVILLE. [L. S.]

STATE OF MISSOURI,
County of St. Louis, ss:

On this fifteenth day of February, 1878, before me came George
22 T. Crane, personally known to me, and known to me to be the president of The American Central Insurance Company of St. Louis, Missouri, who, being by me duly sworn, says that he resides in the city of St. Louis, Missouri; that he is the president of said American

Central Insurance Company of St. Louis, Mo.; that he knows the corporate seal of said company; that the seal affixed to the foregoing bond is the corporate seal of said company, and was affixed thereto by order of the board of directors of said company, and that he signed his name thereto by the like order as president of said company.

GEORGE T. CRANE.

[COM. SEAL.]

LOUIS MONROSE.
JOHN MULVILLE.
JOHN W. HOTCHKISS,
Commissioner for the State of New York, resident at St. Louis, Mo.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Louis Monrose, of number 480 West 24th street, in said city of New York, and John Mulville, of number 225 West Warren street, in the city of Brooklyn, county of Kings and State aforesaid, being severally
23 duly sworn, depose and say, and each for himself deposes and says, that he is a resident and householder in the State of New York, and is worth the sum of two thousand dollars over and above all his debts and liabilities and over and above all property exempt by law from sale on execution.

LOUIS MONROSE.
JOHN MULVILLE.

Sworn to before me this 18th day of Feb., 1878.

[NOTARY SEAL.]

G. T. PATTERSON, JR.,
Notary Public, N. Y. Co. (# 18).

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

On this 18th day of February, 1878, before me came Louis Monrose and John Mulville, to me personally known to be the persons described in and who executed the foregoing bond, and the said Louis Monrose and John Mulville severally personally acknowledged that they executed the same.

[NOTARY SEAL.]

G. T. PATTERSON, JR.,
Notary Public, N. Y. Co. (# 18).

(Endorsed:) Approved Feb'y 28th, 1878.

J. N. GILBERT.

24 (Endorsed:) Supreme court. William R. Grace & others ag'st The American Central Insurance Company of St. Louis. Bond. George W. Parsons, def't's att'y.

25 At a special term of the New York supreme court, held at the court-house in the city of Brooklyn, county of Kings, on the 28th day of February, 1878.

Present, Hon. Jasper W. Gilbert, justice.

WILLIAM R. GRACE AND OTHERS
against
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

On reading and filing the annexed petition of The American Cen-

tral Insurance Company of St. Louis, dated the 15th day of February, 1878, praying for the removal of this suit into the circuit court of the United States for the eastern district of New York, for the second circuit, in pursuance of the laws of the United States relating to the removal of suits from State courts, and upon filing the bond, with good and sufficient surety, offered by said defendant, according to the requirements of said laws, on motion of George W. Parsons, attorney for said defendant, it is

26

Ordered that said bond, with good and sufficient surety, and said petition, be accepted, and that said suit be removed into the circuit court of the United States for the eastern district of New York, in the second circuit, and that no further proceedings be had in this court.

Witness Hon. Jasper W. Gilbert, one of the justices of said supreme court of the State of New York, and the seal thereof, the 28th day of February, 1878.

[L. S.] JOHN DELMAR, *Clk.*

Enter.

J. W. G.

STATE OF NEW YORK,
County of Kings, ss:

I, John Delmar, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the foregoing with the original summons, complaint, answer, affidavit of merits, petition, bond, and order for removal of cause on file in my office, and that the same are true transcripts thereof and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 28th day of February, 1878.

[SEAL.] JOHN DELMAR, *Clerk.*

27 (Endorsed:) Supreme court. William R. Grace & others ag'st The American Central Insurance Company. Order and papers on removal of cause. George W. Parsons, def't's att'y. Filed March 1st, 1878. Refiled March 6th, 1878.

28 U. S. circuit court, eastern district.

WILLIAM R. GRACE & OTHERS
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis, Missouri.

The defendants in this action having procured from the supreme court of the State of New York, in the second department thereof, an order to remove this action from said State court to this court, pursuant to an act entitled "An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from said courts, and for other purposes," approved March 3rd, 1875, said order bearing date February 28th, 1878, and the certified copy of the record in such suit having been filed in the office of the clerk of this court on the first day of

March, 1878, and it appearing that such copy of the record should be filed on the first day of the session next following such order of removal: Now, on motion of George W. Parsons, defendant's attorney, it is ordered
29 that the clerk of this court refile the said record as of said first day of this session of said court.

Dated March 6th, 1878.

CHAS. L. BENEDICT.

(Endorsed:) United States circuit court, eastern district of New York. William R. Grace & others ag'st The American Central Insurance Company of St. Louis. Order directing record from State court to be refiled. George W. Parsons, def't's att'y. Filed and entered the 6th day of March, 1878.

30 October 4th, 1878—stated term.

Present, Hon. Chas. L. Benedict, district judge.
Court opened.
Jurors called; attendance recorded.

WILLIAM R. GRACE ET AL.
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY.

Cause called.
Appearance:
W. Britton, esq., for plaintiff;
G. W. Parsons, " defendant.
Hearing ordered.
Jury empaneled as follows: E. A. Lambert, Wm. H. Hamilton, Norman H. Matteson, Chas. M. Nichols, Edgar Forman, A. R. Sewall, John F. Anderson, jr., Daniel D. Winant, Geo. E. Archer, Wm. Mackey, Edwin H. Crampton, Roger W. Waldo.
Mr. Britton opens case for plaintiff.
Evidence for plaintiff:
Policy of insurance offered in evidence stipulated that $5,157.37
31 is the sum to be recovered, if anything;
George L. Duval sworn and examined;
Frank H. Anthony " " "
Mr. Parsons opens for defendant.
Evidence for defendant:
John D. Carroll sworn and examined;
John Mulville, called for def't, sworn & examined;
Wm. W. Henshaw " " " " "
L. Satterlee " " " " "
Def't rests.
Chas. R. Flint, called for plaintiff, sworn, & examined;
Frank H. Anthony, recalled, " "
Mr. Parsons asked that court direct a verdict for defendant, there being no question of fact, only of law. Denied. Exception.
Mr. Britton asked instruction to jury to find for plaintiff, on ground that

Anthony was not the agent; 2nd, that clause in policy does not mean notice to agent. Denied. Exception.

Mr. Parsons asks instruction to jury that notice to Anthony was equivalent to notice to Wm. R. Grace et al. Denied. Exception.

Mr. Parsons addresses jury.

Mr. Britton " "

Court charged jury. Jury retired in charge of a sworn officer, with instructions to bring in a sealed verdict at 11 o'clock Monday morning, October 7th, 1878.

Court adjourned to October 5th, 1878.

32 October 7, 1878—stated term.

Present, Hon. Chas. L. Benedict, district judge.

Court opened.

Jurors called and attendance recorded.

WILLIAM R. GRACE ET AL.
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

The jury in the above cause appear in court and return to the court a sealed verdict.

Verdict is for the defendant, and ordered to be so recorded.

Mr. Britton, counsel for plaintiff, moves for a new trial.

Stay of proceedings granted.

33 At a circuit court of the United States for the eastern district of New York, held at the court-house in the county of Kings, on the 2nd day of October, A. D. 1879.

Present, Hon. Charles E. Benedict, judge.

WILLIAM R. GRACE AND OTHERS
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

A motion for a new trial having been made in the above-entitled action upon the minutes of trial of the court, and Winchester Britton, esquire, having been heard in support of said motion on the part of the plaintiffs, and George W. Parsons, of counsel for defendant, opposed, it is ordered that said motion be, and the same is hereby, denied, and that judgment upon the verdict heretofore rendered herein be entered for the defendant in this action, with costs.

CHAS. L. BENEDICT.

Filed and entered the 2nd day of October, 1879.

34 *Defendant's bill of costs.*

U. S. circuit court, eastern district of N. Y.

WILLIAM R. GRACE & OTHERS
agt.
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

GENTLEMEN: Please take notice that the bill of costs in the above-entitled cause will be taxed before the clerk of said court, at his office, in the city of Brooklyn, on the ninth day of October, A. D. 1879, at 10 o'clock in the forenoon of that day, as follows, viz:

Docket fee	20 00	
Opposing motion for new trial; motion denied with costs	10 00	
	30 00	
Off	10 00	
		20 00

DISBURSEMENTS.

Attendance of following witnesses: John D. Carroll, John Mulville, Wm. W. Henshaw, Livingstone Satterlee, at $1.50 ea	6 00	
Postages	18	
Paid clerk for certified papers on transfer of case	5 24	
35 Forward	11 42	
Paid clerk for filing same in U. S. court	4 00	
Entering order on transfer	95	
Entering order denying motion for new trial	70	
Affidavit	25	
Disbursements on perfecting judgment, to be adjusted by clerk	12 65	
		29 97
		$49 97

Taxed & adjusted at forty-nine $\frac{97}{100}$ dollars, Oct. 9th, 1879. B. Lincoln Benedict, clerk.

Dated New York, October 3rd, 1879.

Yours, &c.,

GEORGE W. PARSONS,
Defendant's Attorney.

To BRITTON & ELY, Esqrs.,
Plaintiffs' Attorneys.

CITY AND COUNTY OF NEW YORK, *ss:*

John F. Jockel, being duly sworn, says that he is a managing clerk in the office of George W. Parsons, the attorney for the defendant in the above-

entitled action; that the foregoing disbursements have been made in this action, or will be necessarily incurred therein, to the best of his knowledge and belief.

JOHN F. JOCKEL.

Sworn to before me this October 3rd, 1879.
[NOTARY SEAL.] JAMES GOUDGE,
Notary Public, Kings County, N. Y.

36 Pleas before the judge of the circuit court of the United States of America of the eastern district of New York, at the court-house in the city of Brooklyn, county of Kings, of the term of October, 1879, to wit, of the ninth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Witness the honorable Charles L. Benedict, circuit judge.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND Charles R. Flint
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY of St. Louis.

Be it remembered that heretofore, to wit, on the 4th day of October, 1878, in October term of the circuit court *of the circuit court* of the United States of America of the eastern district of New York, in the city of Brooklyn, in said district, before the judge of the said court, came William R. Grace, Michael P. Grace, and Charles R. Flint, the plaintiffs, by Britton and Ely, their attorneys, and the American Central Insurance Company of St. Louis, Mo., the defendant, by George W. Parsons, its attorney, and brought then and there into the said court, before the
37 judge thereof, the record as made up in the above-entitled action in the supreme court of the State of New York, in the second judicial district thereof, duly transferred to the said United States circuit court according to the statute in such cases made and provided, which said record is hereunto annexed and forms a part of this judgment; and on the said fourth day of October above mentioned, before the judge of the said court, came as well the above-mentioned plaintiffs as the above-mentioned defendant, by their respective attorneys, and the jurors of the jury summoned to try the said issues, being called, also came, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the above-named plaintiffs are not entitled to maintain their action against the above-named defendant in manner and form as the said plaintiffs complained against the said defendant; and the plaintiffs having thereupon moved the said court, before the judge thereof, upon the minutes of the trial of the said court, to have said verdict set aside and that the plaintiffs have a new trial of the said action, and the said court having heard the respective parties by their respective attorneys, and having given due deliberation thereupon, did deny the said motion, with costs, as will appear by the order hereto annexed. Therefore it is considered that the said defendant do have judgment against the said plaintiffs
37½ upon said verdict, and do recover against the plaintiffs for the costs, charges, and disbursements of the said defendant, as adjusted by

the clerk of said court, the sum of forty-nine dollars and ninety-seven cents, and that the defendant have execution therefor against the said plaintiffs.

And the said plaintiffs in mercy, &c.

Judgment signed this ninth day of October, 1879.

B. LINCOLN BENEDICT, *Clerk.*

38 (Indorsed:) U. S. circuit court, eastern district of N. Y. William R. Grace and others vs. The American Insurance Company. Judgment and notice of entry. George W. Parsons, def't's att'y. To Britton & Ely esqs., pl'ffs, att'ys. Filed and entered Oct. 9th, 1879.

39 U. S. circuit court, eastern district of New York.

WILLIAM R. GRACE AND OTHERS
against
THE AMERICAN CENTRAL INSURANCE COMPANY, of St. Louis.

1878, January 23. Action commenced in N. Y. supreme court in and for Kings County by service of summons & complaint. Britton & Ely, plaintiffs' attorneys.

1878, February 12. Issue joined by service of defendant's answer. George W. Parsons, defendant's attorney,

1878, February 28. Action removed by order to circuit court of the United States for the eastern district of New York.

This action came on for trial at the U. S. circuit court for the eastern district of New York, on the 4th day of October, 1878, before the Hon. Charles Benedict and a jury, Winchester Britton appearing for plaintiffs, George W. Parsons appearing for defendant.

It was stipulated as follows:

1. That no question should be made as to proofs of loss having been furnished in the time and manner required by the policy.

40 2. That it should not be claimed as a defence to recover in this action that the policy had not taken effect in consequence of the non-payment of the premium on the insurance.

The plaintiffs to maintain their cause called as a witness GEORGE L. DUVAL, who, being duly sworn, testified as follows:

Examined by Mr. BRITTON:

Q. What is your business?
A. Clerk for W. R. Grace & Co.
Q. What was their business last year?
A. Commission merchants.
Q. Did they have a lumber yard?
A. Yes.
Q. They are the parties for whom this insurance was effected—this policy?
A. Yes.
Q. Did you attend to that business for them?

A. Yes, sir; I supervised it.

Q. Whom did you apply to to obtain this insurance policy for you as broker?

A. Mr. W. R. Moyes.

Q. Do you know whether he is procurable by subpœna?

A. I understand not. I have tried to find him.

Q. (Showing policy to witness.) Is that the policy delivered by the insurance company?

A. Yes, sir.

Q. Do you remember on what day it was delivered; about the time it bears date?

A. Yes, sir.

Q. Who was this received from?

A. Mr. Moyes.

Q. When?

A. I should judge a week before the fire; I am not certain as to date. It was before the fire—several days before the fire.

(Policy introduced in evidence and marked "Exhibit A.")

Cross-examined by Mr. PARSONS:

41 Q. Have you anything in your mind by which you identify the fact of the receipt of this policy before the fire?

A. I remember the company and I remember the amount.

Q. How many policies did you have on this property?

A. I suppose there were in the neighborhood of 40.

Q. About how many were obtained about that time?

A. Would not like to say. We were procuring insurance all the time. Just about that time our lumber was coming in; we were procuring a good deal about that time, increasing our insurance daily almost.

Q. You have seen the proofs of loss?

A. Yes.

Q. Do they state correctly the amount of insurance and the amount of the whole loss?

A. Yes.

Q. The amount of the whole loss, then, was $136,904.07?

A. That is the amount; yes, sir.

Q. The whole amount of the insurance was how much?

A. $146,000.

Q. Then the insurance exceeded your loss by about $10,000?

A. The salvage on it.

Q. The actual loss sustained was less by some $10,000 than the amount of insurance?

A. We claimed a large amount, but the appraisers appointed by the insurance company allowed us only $136,904.07. We finally accepted that.

Q. That forms the basis of your claim against this company, does it not?

A. Yes, sir.

Q. Did you keep any memorandum at the time respecting the policies, when received?

A. Yes, sir.

Q. The date when you received the insurance policy itself?

42 A. The date of the receipt? No, sir; we may not have that. We simply make an entry in our insurance book of the time the policy has to run and when it terminates.

Q. You have in fact no memorandum in writing which specifies the time of the receipt of this policy?

A. I think not.

Q. It is only from memory that you are able to state as a fact that this policy was received before the fire?

A. Yes.

Q. You have no circumstance by which you identify it?

A. I recollect, as I stated before, the company and the amount of the policy. I recollect this company in particular. I recollect the company by the name.

Q. You knew Anthony at the time that this insurance was obtained?

A. Yes, sir.

Q. You knew it was obtained through him?

A. I cannot say that I did. I know that Moyes was the broker we employed.

Q. You knew that he employed Anthony?

A. No, sir; I do not know that he did. I am not certain as to that.

Redirect examination:

Q. You had charge of this insurance business, didn't you?

A. Yes, sir.

FRANK H. ANTHONY sworn for same.

Examined by Mr. BRITTON:

Q. What was your business a year ago?

A. Insurance agent, 168 Montague street, Brooklyn, New York.

43 Q. (Showing policy to witness.) Did you procure that policy?

A. Yes.

Q. From whom did you receive instructions to so procure it?

A. W. R. Moyes.

Q. On what day?

A. He wrote me a letter requesting insurance.

Q. Is that the letter (showing letter to witness)?

A. That is the letter; I had seen him, I think, the day before I got that letter.

Q. What did he say?

A. He said he wanted some more insurance and he would advise me by mail.

Q. Did you do anything in pursuance of that?

A. Yes, sir; I placed a policy for $5,500 in the American Central Insurance Company.

Q. On what day did you receive this policy?

A. I received it Tuesday morning the 27th of September, to the best of my knowledge and belief.

Q. What did you do with it?

A. I entered it on my books and mailed it to Moyes in his New York office.

Q. What day?

A. The same day I received it.

Cross-examination:

Q. You say you received it on the 27th?

A. To the best of my knowledge and belief; it might have been the 26th; books in my office will show it.

Q. You had procured other insurance, had you not, for the plaintiffs in this action?

A. Yes, sir.

Q. You were in the habit of doing it, were you not?

A. Yes, sir.

Q. They knew that fact, didn't they?

44 A. W. R. Grace & Co.? Yes, sir.

Q. And your habit was to deliver the policies when you received them to Moyes?

(Objected to. Allowed. Exception.)

A. A portion of them we received and sent to him; more, direct to Grace & Co.

Q. About that time?

A. Not that time; might have been a week or so before.

Q. Were they large insurances?

A. Yes, sir; we insured them very heavily.

Q. Did you see Carrol in regard to cancelling this insurance any time before the fire?

A. Yes, sir.

Q. On what day was it?

A. If I received the policy from him on Tuesday, it was on Thursday; if I received it on Wednesday, it was on the Friday morning before the fire.

Q. Moyes was doing business also in New York?

A. Yes, sir; in Pine street.

Q. When Mr. Carrol called on you did you not say to him that you would get the policy from Moyes and deliver it to him?

A. I told him I would have the policy returned.

Q. Didn't you say you would get it from Moyes?

A. I cannot remember whether I said I would get it from Moyes or from Grace & Co., but I said I would get the policy returned.

Redirect examination:

Q. (Showing affidavit to witness.) Look at that affidavit and see whether it was a few days after that policy was delivered that he called on you.

45 A. I see that I was mistaken; it was two days previous to the fire that I was called on to give the policy back; this is a sworn affidavit made by me at the time.

Q. You were in error in saying two days afterwards?

A. Yes, sir; it was two days before the fire.

Plaintiffs rest.

JOHN D. CARROL sworn for defendant:

Q. What is your business?
A. Insurance generally.
Q. How long?
A. Seven or eight years.
Q. What was your business before that?
A. I was in the internal revenue for some time.
Q. Are you acquainted with the general usages and customs of insurance men in transacting insurance business?
A. Generally.
Q. You represent to some extent The American Central Insurance Company?
A. I do.
Q. And other insurance companies?
A. Yes, sir.
Q. Who are the general agents of that company?
A. Monrose and Mulville; they transact business in New York City.
Q. You represented other insurance companies at that time?
A. I did.
Q. And do now?
A. Yes, sir.
Q. You received applications for insurance, I suppose?
A. I did.
Q. And submitted them?
A. Yes, sir.
Q. And countersigned the policies which were signed by the officer of the company? You didn't make out an independent policy?
46 A. Certainly.
Q. This policy was delivered to Anthony?
A. Yes, sir; his business was an insurance broker, doing business in Brooklyn. I knew him some time before that.
Q. You received no part of the premium?
A. No, sir; never have.
Q. When did you see Anthony after you had delivered the policy to him?
A. I think it was the morning of the 6th, Saturday morning. I went to his office Friday, the 5th, but didn't see him; I saw him next morning between 9 and 10 o'clock.
Q. State what was said between you and Anthony in regard to delivering you that policy.
A. I told him The American Central Insurance Company refused to carry that risk, and that I wanted the policy back. He said he had sent it to New York, and would send to New York and get it back.
Q. Did he state any time?
A. That day; yes, sir.
Q. When you said that the company had refused to carry the risk, in answer to that what did he say?
A. He would let me have the policy back; that of course determined me on what I had to do.
Q. Did he use any other expression, "That is all right," or anything of that kind?

A. My impression is that he said, "All right," or something to that effect; that he would let me have the policy.

47 Q. Did you send to the office that day after the policy?

A. I sent there in the afternoon to get it.

Q. Of course you are acquainted with the clause in the policy that the insurance may be terminated at any time on giving notice to that effect to the insured?

A. Yes, sir.

Q. You did not have any personal transaction with Grace & Co.?

A. No, sir.

Q. Are you familiar with the customs in regard to transactions in insurance *in insurance* in this city and in New York?

A. Yes.

Q. Do you know whether or not there is a custom prevailing in the cities of New York and Brooklyn to give notice to the agent or broker of the party insured in regard to the cancellation of the policy?

(Objected to on the ground that the question does not call for a custom binding upon plaintiffs; and, second, it has been affirmatively proven in this case what was the authority to the broker; and as immaterial. Allowed, and exception by plaintiff.)

A. Yes, sir; there is such a custom.

Q. Is that not a custom well known in both cities?

(Same objection, ruling, and exception.)

A. Certainly; it is a well-known custom.

Q. General prevailing custom?

(Same objection, ruling, and exception.)

A. As far as I know it is; I have always done so.

48 Cross-examination by Mr. BRITTON:

Q. When did you get this policy?

A. Along about the 27th.

Q. Was it the 26th or 27th, the day it bears date or the next day?

A. I think the following morning, the 27th.

Q. This policy had previously been delivered to you by the company, signed and executed by them?

A. Yes, sir.

Q. In common with other policies, in blank as to the risk?

A. Yes.

Q. You, in pursuance of your authority as agent for the company, to fill up the blanks and deliver the policy?

Mr. PARSONS. We do not deny that at the time the policy was delivered that the company was bound.

Q. Where did you see Mr. Anthony?

A. At his office.

Q. How long before that had you any communication from the company on that subject?

A. Friday afternoon.

Q. Did you notify the company that you had taken this risk; how long after you delivered this policy?

A. On the evening of the fifth of October I was at their office and communicated with them about it.

Q. For the first time?

A. I do not know as for the first time; I think I had the letter before that—some few days before; could not give any definite time.

Q. At any rate you acted first under your sense of duty in this matter on Friday?

A. Yes, sir.

49 Q. Then you didn't find Anthony, and on Saturday morning you did?

A. Yes, sir; I saw him in his office.

Q. Who else was there?

A. Could not say; there were other parties there.

Q. Did you speak with him in the presence of the other parties?

A. I could not say whether they were all together or not; they were all in the same room.

Q. Who spoke first, you or Anthony, on that occasion?

A. I think I did.

Q. Do you remember what you said to him—the words or the substance?

A. I remember the words I used on that particular point. I went in there, and my impression is there were no words expressed before I said to him, "The American Central has refused to carry that risk of Grace's."

Q. Did you say anything more than that before he answered?

A. I think he said, "All right;" that is my impression. I could not swear positively whether I spoke next after that or not; my recollection is that he said he had sent the policy to New York, and that he would send over and let me have it back—would send over right away.

Q. What did you say to that?

A. I said I wanted it that afternoon; that is about all that transpired.

Q. Then you sent somebody that evening and didn't get it?

A. Yes, sir.

Q. When did you next see Anthony?

A. The next I saw him was Monday morning.

50 Q. And had conversation with him then?

A. Yes.

Q. Where did that conversation occur on Monday, and at what time?

A. I am unable to state about the time.

Q. At the time it occurred did you know that this property had been burned?

A. I did.

JOHN MULVILLE sworn for same.

Examined by Mr. PARSONS:

Q. What is your business?

A. Insurance agent.

Q. You are of the firm of Melrose & Mulville?

A. Yes, sir.

Q. What relation in 1877 did you hold to The American Central Insurance Company?

A. I was one of their general agents.

Q. Their place of business?

A. 155 Broadway, New York.

Q. Your firm is the one to which the last witness referred?

A. Yes.

Q. How long have you been connected with insurance companies?

A. Something over 12 years, all over the United States—Connecticut, Missouri, Pennsylvania, New York—the last seven years in New York City.

Q. Are you acquainted with the customs in respect to doing insurance business in the cities of New York and Brooklyn?

A. Yes.

Q. Do you know whether or not there is a custom prevailing in reference to giving notice to the agent of the insured, where the agent has procured a policy, of the cancellment of the risk?

A. Yes, sir; there is a custom.

51 Q. What is the custom?

(Objected to as before; same ruling and exception.)

A. To notify the agent of the insured. I never did otherwise.

By the COURT:

Q. You mean by that the broker who effected the insurance?

A. Yes, sir.

Q. Is that custom universal or not?

(Objected to as before; same ruling and exception.)

A. Yes, sir.

Q. How long has it prevailed?

(Objected to as before; same ruling and exception.)

A. Ever since I did business in New York. Anything else would be discourteous.

Q. Did you have a conversation after the occurrence of this loss with Mr. Grace in regard to it?

A. I did.

Q. State what he said so far as related to this business, and what you said.

A. I went to Mr. Grace with both the agents, my agent and his agent. Not my agent but his agent, that is the agent of Mr. Anthony, related to him the circumstances of the cancellation of this policy; he replied that he was very sorry that I did not call on him. I told him that it was not considered courteous in our business to go behind the agent to call on the principal himself in such matters, and that I had followed the general rule of business; that I had always done it and it was the custom in the profession in this city and in other cities. And he said that he was very sorry, and he hoped there would be no difficulty; that I had better see the other companies in interest, and if they did not make any claim that he should not. He said he would have been very glad to have handed me the policy; that he had never seen the policy, and he didn't know that he would have accepted it if he did see it, and was very sorry that I didn't call on him instead of the agent.

52 WILLIAM W. HENSHAW sworn for same.

Examined by Mr. PARSONS:

Q. What is your business?

A. Secretary of the Long Island Insurance Company of this city.

Q. Have they an office in New York?

A. Yes, sir.

Q. How long have you been in the insurance business?

A. About 25 years.

Q. You are connected with the Board of Fire Underwriters of New York?

A. Yes, sir; secretary.

Q. How long have you been such?

A. Probably 10 years.

Q. Have you become familiar with the customs and manner of doing business—underwriters, business—in New York and Brooklyn?

A. I think I have.

Q. Do you know whether it is a custom where insurance has been taken out by the agent or broker, and the company desires to cancel it, to give notice of that cancelment to the broker?

(Objected to as before; same ruling and exception.)

A. It has been the custom.

Q. Is it a general custom?

A. I think it is.

Q. Well known, is it not?

A. Yes, sir.

Cross-examination:

Q. You say it is the custom to effect the cancelment by giving notice to the broker. Do you mean simply that it is usual to the etiquette of business between brokers and the companies to effect cancellment through notice to the broker?

A. I do not know anything about the etiquette between the two; I know what the custom is; the custom is if a risk is offered to me through a broker, and the risk is afterwards rejected, the rejection comes through the broker?

Q. Do you mean any more than this: that having partly effected an insurance through a broker, and that insurance is conditionally effected subject to the acceptance of the company that it is the custom to act through the broker as to whether or not it is accepted?

A. I can only answer that question as regards the local company that I represent. I could not say what a company, that was doing an agency business would do.

53 Q. The insurance is effected through a broker with your company?

A. Yes, sir.

Q. Conditional to your acceptance?

A. Yes, sir.

Q. If you decline to accept, your custom is to notify the broker through whom the insurance was effected?

(Objected to.)

Q. Do you mean to say that the general custom is any different from that I have stated to you, so far as you know?

A. I mean to say that the custom would be to decline it through the broker in such a case, and that is all I mean to say.

Re-direct examination:

Q. Supposing that the insurance has been taken by the agent and the pol-

icy has been given to the agent of the assured, is there a custom in respect to cancelling that policy if the company desires to cancel it?

A. I have said there is a custom.

Q. What is that custom?

A. To notify the broker.

Recross-examination:

Q. Do you mean to say that if a company has taken and perfected an insurance and the policy has been delivered, and months afterwards, more or less, they desire to cancel it under the condition of the policy, that the custom is only to notify the broker through whom the original policy was taken, and that that perfects the cancelment—having given notice to the agent, under that state of facts would that be considered a cancelment of the policy under the custom?

54 (Objected to as not cross-examination, not responsive, and incompetent.)

Q. Say ten days afterwards?

A. That is the custom in my office, and I suppose it to be the custom in the trade.

Q. Do you know anything about it except in your office?

A. Yes, sir; I know it in other cases; I know as well as I can know anything that that is the custom.

LIVINGSTONE SATTERLY sworn for same.

Examined by Mr. PARSONS:

I am an insurance agent of New York City, general agent; been engaged in the business 21 years in New York City.

Q. Are you acquainted with the customs prevailing in New York and Brooklyn in regard to the transacting of insurance business?

A. Familiar as general agent covering the United States.

Q. What is the custom where an insurance has been effected by an agent of the company with a broker or agent of the insured in reference to cancelling the policy, in reference to giving notice of the cancelment of the policy under the terms of the policy?

(Objected to as before; same ruling & exception.)

A. To notify the broker or agent of the insured.

Q. Is that the general custom?

A. It is the general custom, well known.

Cross-examination:

55 Q. And that notice being given, is it understood by that custom that the cancelment is perfected at the time notice is given?

(Objected to as immaterial, incompetent, and irrelevant. Excluded, and exception by plaintiffs' counsel.)

Defendants rest.

CHARLES R. FLINT sworn for plaintiffs.

Examined by Mr. BRITTON:

Q. You are one of the firm of W. R. Grace & Co.?

A. Yes, sir.

Q. Have been for some time?
A. Yes, sir.
Q. Their business is extensive?
A. Yes, sir.
Q. State when you first saw, and under what circumstances, this policy here in controversy.
A. I had been absent from the office some weeks before the fire; the fire took place on Sunday and I arrived in New York on Monday morning. On coming to the office on Monday morning I asked for the policies on this risk, and this policy was handed me by the clerk with other policies.
Q. What time in the morning?
A. I do not remember exactly; I should think 9 o'clock.
Q. When your firm presented your claims for loss, did you or did you not include this company?
A. We included it.
Q. Did you at any time cease to make, to your knowledge, or intentionally conclude not to make, a claim against this company?
56 A. No, sir.

Cross-examination:

Q. These proofs of loss were served after the company had had a consultation with Grace & Co. in regard to it, were they not?
A. There were preliminary papers made out first before this proof, the date of which is the 8th day of December.
Q. And the fire occurred——
A. About the fifth of October.

F. H. ANTHONY recalled for same.

Examined by Mr. BRITTON:

Q. Look at your book and see whether it is the 26th or 27th.
(Witness consults book brought from the office.)
A. The 26th of September, the date of the policy.
Q. State the exact words, if you can, that passed between you and Mr. Carroll when he called on you in reference to the cancelment of the policy.
A. On Saturday morning between, 9 and 10 o'clock, he called at the office and I saw him in person. He said that The American Central Insurance Company wished to go off of that risk, and I explained to him the number of companies that were on the risk and the class the risk was on. He said the company did not think it was rate enough to carry it. I told him I would endeavor to get the policy back during that day.
Q. Was that all that was said?
A. I think it was, at that time.
57 Q. When did you next see him?
A. It was Monday morning.
Q. Between then and Sunday did you see or communicate with Grace & Co. at all?
A. Between then and the fire I did not.
Q Did you communicate with Moyes between then and the fire on that subject?
A. I did not.

Q. Are you acquainted with the customs amongst fire insurance companies generally in this vicinity?

A. Yes, sir.

Q. How long have you been insurance agent—engaged in that business?

A. Been in the insurance business some 12 or 14 years.

Q. Do you know of any custom upon the question whether, when a policy had been issued and has become valid, obtained through a broker, that a notice to that broker of a desire to cancel the policy by the company, and without notice to the principal, effects the cancelment?

(Objected to. Counsel for plaintiff offered to show that on a notice being given that the insurance is terminated, that by the well-established custom it does not take effect until a reasonable time has elapsed to enable insured to reinsure. Excluded, and exception by plaintiffs' counsel.

Q. Was anything said between you and Carrol, on this interview you speak of, in regard to time being given to effect other insurance?

A. There was not.

Q. Was to the word "cancelment" or "to cancel" used at all in any way?

A. No, sir.

58 Cross-examination:

Q. I understand you to say that although you discussed the question about its being a good risk by quoting companies that were upon it, he said that the company positively declined to carry it, did he not?

A. He said the company did not like to carry on the risk on account of the rates.

Q. Didn't you swear that after you had told him what companies were on that, he said the company had declined to carry on the risk?

A. I do not remember what I did say; but whatever I stated was the fact, and whatever I state now is the fact.

Q. You told him what companies were in to induce him to carry it?

A. Yes, sir; and then he said the company didn't want to carry the risk, and wanted to get the policy back.

Q. You often make insurance by verbal contract?

A. Yes, sir.

Testimony closed.

Counsel for plaintiffs moved the court to instruct the jury to direct a verdict for the plaintiffs, on the grounds:

First. There is no evidence in the case whatever that Anthony was the agent of these plaintiffs in this transaction.

Second. That the clause referred to in the policy does not render a notice to the broker who procured the insurance, of a cancelment of the

59 policy effectual to operate as a cancelment thereof.

Third. As a matter of law, there is no evidence in this case which shows that Anthony was the agent of the plaintiffs at the time that this notice was claimed to have been given to him.

Fourth. That the plaintiffs are entitled to recover under the policy.

Fifth. That there is no evidence that the policy was ever cancelled by defendant.

(The court overruled the motion and plaintiffs counsel excepted.)

The court charged the jury as follows:

GENTLEMEN OF THE JURY: It is not impossible that this case turns upon questions of law, and that the responsibility of its decision belongs to me; but as I now view the case, there is a single question of fact for the jury to determine.

A valid policy of insurance was issued by the defendants to the plaintiffs upon certain property. A fire occurred and the defendants became bound to pay the sum of $5,447.37 on this policy, if it was an existing policy at the time of the loss. If the policy had been cancelled, the defendants are not liable to pay anything.

The policy contains a clause authorizing the company to put an end at any time by notice of cancellation. Neither the law nor the contract requires a written notice of cancellation, but some proper notice of
60 cancellation is required. It was not necessary that the policy be returned in order to effect a cancelment of the contract.

By this contract the parties have agreed that a notice of cancelment shall put an end to it. The question of fact is whether there was notice of the cancelling of the policy given by Mr. Carrol, who acted for the company, to Mr. Anthony, who, for the purposes of this question, must be taken to be the agent of the plaintiffs.

Counsel on the part of plaintiffs insist that I should decide, as matter of law, that there was no notice given, but it seems to me that it is proper for the jury to consider what was said and done by Mr. Carrol and Mr. Anthony in regard to cancelling the policy, and say as a matter of fact whether or no Mr. Carrol gave Mr. Anthony notice that that was the end of that policy. If you should come to the conclusion that what Mr. Carrol said amounted to this: that upon returning the policy he would cancel it, then that would not be a notice of cancellation sufficient to terminate the contract. Cancellation can be effected without returning the policy, but if all that Mr. Carrol did was to express a wish to have the policy cancelled, that would not be cancelling the policy.

The question is whether he did or said what conveyed to Anthony knowledge of a cancellation of the policy by him at that time. If he gave such notice, then the defendants are entitled to a verdict. If he did not, then the plaintiffs are entitled to a verdict for $5,447.37.

61 Counsel for plaintiffs excepts to so much of said charge as declares that Mr. Anthony, for the purposes of this question, must be taken to be the agent of plaintiffs.

Also requests the court to charge the jury that there is no evidence to justify finding that Mr. Carrol conveyed to Mr. Anthony knowledge of the cancellation of the policy by him at that time, if it had been cancelled.

Also requested the court to submit to the jury whether any custom was proven.

The court declined each and every such request, and counsel for plaintiffs excepted.

The court directed the jury to bring in a sealed verdict at the next meeting of the court.

Court adjourned.

MONDAY, *October 7th*, 1878.

The jury brought in a verdict for the defendant.

The plaintiff' co'nsel thereupon moved the court upon its minutes to set aside the verdict of the jury, and for a new trial, and the court having heard counsel for the respective parties upon said motion, and due deliberation thereon having been had, did deny said motion, and in denying the same, delivered the following opinion:

62 This case comes before the court upon a motion for a new trial.

The action is brought upon a policy of insurance, to recover for the destruction by fire of certain lumber belonging to the plaintiffs. A trial was had before the court and a jury, when a verdict was rendered for the defendants. The plaintiffs now move for a new trial, upon exceptions to certain rulings of the court, made at the trial.

The evidence shows that the plaintiffs had instructed one Noyes, an insurance broker in New York, to procure for him insurance to a large amount upon a quantity of lumber. Noyes employed F. H. Anthony, also an insurance broker, to effect insurance in Brooklyn, and accordingly Anthony procured several policies in the name of the plaintiffs. Among them was the one in suit, which, when procured, was passed to the possession of the plaintiffs. This policy contained the following clause:

"8. This insurance may be terminated at any time, at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."

A few days after the delivering of this policy the defendants notified Anthony of their election to terminate the policy at that time. Anthony accepted the notice, and promised to return the policy. On the following night a fire occurred, by which the property insured was destroyed. At the time of the fire the plaintiffs had no knowledge of what had taken place between the defendants and Anthony in regard to terminating the insurance. Upon these facts the plaintiffs requested the court to instruct the jury to find a verdict for the plaintiffs for the amount of the policy, $5,447.37. The request was refused, and the plaintiffs excepted. This exception presents for determination the main question in dispute between these parties, viz: whether the notice of termination of the insurance given by the defendants to the broker Anthony, and accepted by the latter in behalf of the plaintiffs, had the legal effect to terminate the insurance? If such was the effect of that notice, the ruling in question was right. If such was not its effect, a verdict for the plaintiffs for $5,447.37 should have been directed, as requested by the plaintiffs.

63 Upon this question my opinion is that the insurance was terminated by the notice of termination given to the broker Anthony, and that the ruling excepted to was right.

The contention on the part of the plaintiffs is that Anthony was not the agent of the plaintiffs for the purpose of accepting notice of termination

of the insurance, and the notice given to Anthony could not therefore affect the plaintiffs' rights under the policy.

The contention on the part of the defendants is that the effect of the 8th clause of the policy, above set forth, was to enable the insurer to terminate the insurance at any time by giving notice to the person who procured the insurance to be taken, and that Anthony was such person. The determination of this question depends upon the effect to be given to the 8th clause of the policy, above set forth. In considering this clause it will be observed that the apparent object of the clause is to provide a method of terminating the insurance. No other subject is specifically mentioned in it. It contains a specific provision for a termination of the insurance by the insured, which is followed by a specific provision for a termination of the insurance on the part of the insurer, by giving notice to that effect; and then follows the provision that in case the insurance has been procured by a person other than the insured such person shall be deemed to be the agent of the assured "in any transaction relating to this insurance;" that terminating the risk is a transaction relating to the insurance, cannot be denied, and inasmuch as the method of conducting such a transaction is the subject to which the prior portion of the clause is devoted, the natural inference is that the subsequent general phrase: "any transaction relating to this insurance," was intended to cover the transaction provided for in the former part of the clause, viz, a termination of the risk by means of a notice to that effect. No language is to be found in any part of the policy indicating an intention to give a limited effect to the phrase, "any transaction relating to this insurance." And in the absence of language indicating such an intention, it is difficult to find ground on which to deny to the words used their natural significance and scope.

The position taken by the plaintiffs is, that the words "relating to the procurement of" must be supplied, and the phrase construed as if it read "any transaction relating to the procurement of this insurance." The only ground upon which such a material addition is based is that without some such limit results clearly never intended would follow from the phrase. Such as permitting the broker to cancel the policy, or under clause (11th) eleventh, bind the assured in the matter of repairs by the insurer. I think reason can be found for denying to the clause in question any effect in the cases suggested, and for limiting the effect of the phrase, "any transaction relating to this insurance," to the subject-matter of the clause of which it forms a part. But however this may be, still the fact that the language, if given its ordinary significance, will work hardships under some circumstances, is no good reason for adding words of limitation not used by the parties. Provisions in policies which are intended to and do render the contract of little value to the insurer are common enough.

If it had been the intention of the parties that the phrase under consideration should be limited to acts relating to the procurement of the insurance it would have been easy to say so, and no reason has been assigned for an omission to disclose such an intention by the language employed. In truth an intention to refer to acts done subsequent to the procurement of the policy is affirmatively indicated by the words "who may have procured this insurance." My conclusion, drawn from the language employed in the policy, is that these parties intended to agree that in case an election by the defendants to terminate the risk, such termination might be effected

by notice given to the broker who procured the insurance to be taken. This conclusion is strengthened by the evidence introduced by the defendants, showing a universal custom in cases when the insurer intends to terminate a risk, to give the notice of termination to the broker who procured the risk. The admission of this evidence was objected to by the plaintiffs, but the evidence was competent, not indeed to make thereby a contract for the parties, or to alter the contract that was made, or to show authority in Anthony, but to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed.

For this purpose the evidence in regard to custom was competent. The fact that the language employed in clause eighth (8), as I have understood it, tends to render the policy a contract in harmony with the usage of the trade, goes to confirm the correctness of that understanding. But it is said that the court erred in not submitting to the jury the question
64 whether the existence of such a usage had been proved. The evidence in relation to the custom was positive, and wholly uncontradicted. It permitted but one conclusion, namely, that the custom contended for did exist. There was nothing, therefore, for the jury to pass on, and the court had a right to treat the custom as a fact proved, and to construe the contract in the light of that fact.

Evidence of the practice in regard to giving notice of termination of the risk having been admitted, the plaintiffs offered to show that when, in accordance with that practice, notice is given to the broker, the understanding is that the notice does not take effect until a reasonable time has elapsed. This offer was rejected, and the correctness of that ruling is also called in question upon this motion. The reason for the rejection of the plaintiff's offer was that it was an attempt by evidence of usage to change the contract which parties had made. The agreement in the policy is that the insurance is to be terminated when notice to that effect is given. The policy does not provide for any lapse of time after the giving of the notice during which the insurer is to be bound; on the contrary, the contract states that the insurance terminates on giving the notice. The evidence offered by the plaintiffs was, therefore, immaterial, and the plaintiffs take nothing by their exception to the exclusion of their offer.

There remains the question whether the evidence shows Anthony to be the person who procured the insurance to be taken within the meaning of the eighth clause of the policy. As to this there is no room for doubt

The only person known to the defendants as the person procuring the insurance was Anthony. The principals never met. Anthony procured the insurance; the policy was sent to him; his name was endorsed upon it, as the agent procuring it. The plaintiffs received the policy so procured and are now suing upon it. It is true, the plaintiffs did not employ Anthony directly, but they employed Noyes, who in turn employed Anthony, and the plaintiffs, by accepting the policy procured by Anthony, ratified the employment of Anthony. They have adopted as their own the act of Anthony in entering into a contract in their behalf, one provision of which contract is that notice of termination of the insurance given to Anthony should be equivalent to notice given to them.

My conclusion, therefore, is, that none of the exceptions taken at the trial afford ground for setting aside the verdict, and that judgment must be entered for the defendants.

65 EXHIBIT A.

American Central Insurance Company to W. R. Grace & Co.

Policy of insurance No. 928, for $5,000, which policy contains the following clause, numbered 8, and is the only clause in the policy having any bearing upon the questions at issue in this action.

"8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term of the policy. It is a part of this contract that any person, other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance."

66 And because the foregoing does not appear of record, this case and exceptions have been made, with leave of the court to turn the same into a bill of exceptions.

The foregoing case and exceptions having been duly settled, and the motion for a new trial made thereon having been overruled, the same are hereby turned into the "bill of exceptions" to be filed in this case; and as such bill of exceptions I have hereunto set my hand and seal, this 12th day of January, 1880.

CHAS. L. BENEDICT.

67 (Indorsed:) U. S. Supreme Court. William R. Grace & others against The American Central Insurance Co., of St. Louis. Bill of exceptions. Britton & Ely, attorneys for plaintiff, 44 Court st., Brooklyn, N. Y.

68 Circuit court of the United States for the eastern district of New York, in the second circuit.

WILLIAM R. GRACE, MICHAEL P. GRACE, AND Charles R. Flint, plaintiffs in error,
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY, of St. Louis, defendant in error.

Know all men by these presents, that William R. Grace, of the city, county, and State of New York, and Charles R. Flint, of the city of Brooklyn, county of Kings, and State of New York, as principals, and Isaac F. Chapman and Benj. Flint, both of the city of Brooklyn, county of Kings, and State of New York, as sureties, are held and firmly bound unto The American Central Insurance Company, of St. Louis, in the sum of two hundred and fifty (250) dollars, to be paid to the said The American Central Insurance Company, of St. Louis, its successor, successors, and assigns; for which payment well and truly to be made, we, the said William R. Grace and Charles R. Flint, as principals, and Isaac F.

69 Chapman and Benj. Flint, as sureties, bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. In witness whereof we have hereunto set our hands and seals this sixth day of November, one thousand eight hundred and seventy-nine.

Whereas the above-named principal', complainants in the action above entitled, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the said action against said complainants by the circuit court of the United States for the eastern district of New York, in the second circuit, on the ninth day of October, 1877.

Now, therefore, the condition of this obligation is such that if the above-bounden William R. Grace and Charles R. Flint shall prosecute a writ of error to effect, and answer all damages and costs and just damages for delay if they fail to make their appeal good, then this obligation shall be void; otherwise it shall remain in full force and virtue.

W. R. GRACE. [SEAL.]
CHAS. R. FLINT. [SEAL.]
I. F. CHAPMAN. [SEAL.]
BENJAMIN FLINT. [SEAL.]

Sealed and delivered in presence of—
[SEAL.]

E. W. GOMBERS,
Notary Public, Kings Co.,
(Certificate filed & acting in N. Y. Co.)

70 UNITED STATES OF AMERICA,
Southern District of New York, City of New York,
County of New York, and State of New York, ss:

On this sixth day of November, 1879, before me personally came William R. Grace and Charles R. Flint, as principals, and Isaac F. Chapman and Benj. Flint, as sureties, to me known to be the persons described in, and who executed the foregoing instrument, and who severally acknowledged that they executed the same for the purposes therein named.

[SEAL.]

E. W. GOMBERS,
Notary Public, Kings Co.
(Certificate filed & acting in N. Y. Co.)

UNITED STATES OF AMERICA,
Southern District of New York, City of New York,
County of New York, and State of New York, ss:

Isaac F. Chapman, being duly sworn, says that he is a resident and freeholder within this State, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

I. F. CHAPMAN.

Sworn to before me this 6th day of November, 1879.
[SEAL.]

E. W. GOMBERS,
Notary Public, Kings Co.
(Certificate filed & acting in N. Y. Co.)

71 UNITED STATES OF AMERCA,
Southern District of New York, City of New York, County of New York, and State of New York, ss:

Benj. Flint, being duly sworn, says that he is a resident and freeholder within this State, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

BENJAMIN FLINT.

Sworn to before me this sixth day of November, 1879.
[SEAL.]
E. W. GOMBERS,
Notary Public, Kings Co.
(Certificate filed & acting in N. Y. Co.)

I consent to the approval of the foregoing bond, both as to form and the sufficiency of the sureties thereon.

GEORGE W. PARSONS,
Attorney for Def't in Error.

72 UNITED STATES AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy-one inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of William R. Grace, Michael P. and Charles R. Flint, vs. The American Central Insurance Company of Saint Louis, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this 30 day of September A. D., 1880, and of the Independence of the said United States the one hundred and fifth.

B. LINCOLN BENEDICT,
Clerk.

73 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William R. Grace, Michael P. Grace, and Charles R. Flint, plaintiffs, and the American Central Insurance Company of St. Louis, defendant, a manifest error hath happened, to the great damage of the said William R. Grace, Michael P. Grace, and Charles R. Flint, as is said and as appears by their complaint. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,
74 you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with

this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.]

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

75 (Indorsed:) U. S. Supreme Court. William R. Grace, Michael P. Grace, and Charles R. Flint, plaintiffs in error, versus The American Central Insurance Company of St. Louis, defendant in error. Writ of error. Britton & Ely, atty's for pl'ff in error, 44 Court st., Brooklyn, N. Y.

Due and timely service of the within is hereby admitted.
New York November 6, 1879.

GEORGE W. PARSONS,
Att'y for Def't in Error.

Filed November , 1879.

76 By the honorable Charles L. Benedict, one of the judges of the circuit court of the United States for the eastern district of New York, in the second circuit.

To the American Central Insurance Company of St. Louis:

Whereas William R. Grace, Michael P. Grace, and Charles R. Flint lately appealed to the Supreme Court of the United States from a judgment entered by the circuit court of the United States for the eastern district of New York, in favor of you, the said The American Central Insurance Company, of St. Louis, as defendants, and against William R. Grace, Michael P. Grace, and Charles R. Flint, plaintiffs.

Therefore you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Brooklyn, in the eastern district of New York, on the 12th day of November, A. D. 1879, and of the Independence of the United States the one hundred and fourth.

CHAS. L. BENEDICT.

77 (Indorsed:) U. S. circuit court, eastern district of New York, in the second circuit. William R. Grace and others, pl'ffs in error, vs. The American Central Insurance Co. of St. Louis, def't in error. Citation. Britton & Ely, atty's for pl'ffs in error, 44 Court street, Brooklyn, N. Y.

Due and timely service of a copy of the within citation is hereby admitted.

Dated November 18th, 1879.

GEO. W. PARSONS,
Att'ys for Def'ts in Error.

(Indorsement on cover:) No. 305. William R. Grace, Michael P. Grace, and Charles R. Flint, plaintiffs in error, vs. The American Central Insurance Company of St. Louis. E. New York, C. C. U. S. Filed 6th October, 1880.

109-278

U. S. Supreme Court.

WILLIAM R. GRACE and others,
Plaintiffs in Error,
vs.
THE AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS,
Defendant in Error.

Brief of Plaintiffs in Error.

STATEMENT OF FACTS.

This is an appeal from a judgment entered in the U.S. Circuit Court for the Eastern District of New York, entered on the verdict of a jury. Plaintiffs insured a quantity of lumber with defendant, who insured through ~~their agents~~ an insurance broker, its agent in Brooklyn. No premium had been paid or demanded, but the policy had been delivered to the plaintiffs. It is conceded that the contract of insurance was perfected on the 26th day of September, 1877.

The policy contained the following clause:

"8.—This insurance may be terminated at any "time at the request of the assured, in which case "the Company shall retain only the customary short "rates for the time the policy has been in force. "The insurance may also be terminated at any time "at the option of the Company, on giving notice to "that effect, and refunding a rateable proportion of "the premium for the unexpired term of the policy. "It is a part of this contract that any person, other "than the assured, who may have procured this in-

"surance to be taken by this Company, shall be "deemed to be the agent of the assured named in "this policy, and not of this Company, under any "circumstances whatever, or in any transaction re- "lating to this insurance."

The broker employed by the plaintiffs to procure the insurance was W. R. Noyes. Noyes, doing business in New York, requested Frank H. Anthony, doing business in Brooklyn, to procure insurance in Brooklyn for plaintiffs, and he accordingly procured this insurance.

This request was without the knowledge of plaintiffs, and the policy when procured was sent to Noyes, and not to plaintiffs; and delivered by Noyes to plaintiffs before the 5th of October, 1877.

Anthony had before procured insurance for Noyes upon plaintiffs' goods, and had sometimes sent the policies directly to plaintiffs, but Anthony had never acted directly as the broker of plaintiffs under their employment.

On the 5th day of October, defendants notified Anthony that they elected to terminate the policy (as the jury found the fact to be), but up to the time of the loss under the policy plaintiffs never knew or had any information that any such notice had been given.

The loss occurred on the night of the fifth day of October, 1877.

Defendant introduced evidence under objection on the trial tending to prove a custom in the insurance business to notify the agent or broker of the party insured procuring the risk, instead of the principal, of an election to terminate the risk, under the foregoing clause of the policy.

Plaintiffs moved for judgment on the evidence on various grounds, appearing in the minutes, but the Court submitted to the jury solely the question as to

whether what occurred between the messenger of the defendants and Anthony on the 5th of October, amounted to a notice of an election by the Company to terminate the risk under the above quoted clause of the policy, reserving all other questions to be determined on ~~this~~ motion. for a new trial which was made and denied

The jury rendered a verdict for defendant.

POINTS.

FIRST.

Judgment should have been, on the trial, directed for plaintiffs.

I.—Notice to Anthony was not such notice of an election to the risk as was required by the terms of the policy. (terminate

1. Anthony was not an agent for the purpose of such notice by virtue of the clause in the policy above quoted.

All that is intended by that clause is, to provide that in all the acts and representations connected with the procurement of the risk, before the issuing of the policy, and as to the knowledge or information possessed by the person, not the insured, applying, such person so procuring it, should be considered the agent of the insured and not of the insurer. His acts and representations connected with the negotiations leading to the consummation of the contract, should be the acts and representations of the insured and not of the insurer, and his knowledge should be the knowledge of the insured and not of the insurer.

But when the contract was complete and the policy delivered, then this clause had answered its purpose and its force was spent. It was never contracted that the broker, being the agent of the insured to make the contract, should, when made, continue to be such without his subsequent consent for its performance, or for any matters subsequent to the consummation of the contract and the delivery of the policy to the assured. The construction claimed by defendant, leads to absurdity.

May the broker procuring the insurance, after the policy has been delivered to the principal, under paragraph 8 terminate the policy by his request? May he, by agreement, cancel the policy and with or without receipt, of the unearned premium?

In case of loss, under paragraph 9 may valid notice be given to him of election by the Company to build or repair? or may he request to arbitrate, binding the principal?

May he under paragraph 11 extend the time of insurance?

May the Company pay him the amount of the loss, and thereby be discharged from obligation?

Or in general, is the person other than the insured who obtains the insurance substituted, so long as the contract thus made shall continue, for the insured, for all purposes connected therewith? Does he become, by virtue of this clause, the irrevocable agent for the insured, who, *nolens volens*, must in all events continue to possess the power to bind the principal whenever the insurer elects to treat with him "in any transaction relating to the" contract of "insurance," and until fully performed?

Such is not its legal construction.

Whited vs. Germania Fire Ins. Co., 76 N.Y.R., 415, 419.
Rohrback vs. Germania Fire Ins. Co., 62 N.Y.R, 47.
Alexander vs. Germania Fire Ins. Co., 66 N.Y.R., 464.
Van Schaick vs. Niagara Fire Ins. Co., 68 N.Y.R., 434.
Planters' Ins. Co. vs. Myers, 30 Am. R., 521; 55 Miss. R., 479.

The clause "relating to this insurance" should be construed as though it read "relating to the procurement of this insurance." The fair intention, in view of the consequences involved, would be thus declared.

If the foregoing is not the true construction of the policy, then it should be construed to mean, that in case of a transaction at any time relating to the insurance, though subsequent to its procurement, wherein the party procuring the insurance, by consent of the parties to the contract, acts in such transaction, he shall be deemed the agent of the insured, and not of the insurer.

For example, should any modification be thus made in the terms of the policy, in such transaction the broker shall be deemed, the agent of the insured, but not that such broker may be dealt with by the insurer, at its option, without the knowledge of the insured. Being an agent and in fact acting in some negotiation relating to the insurance, he shall be deemed the agent of the insured, but nevertheless, the agency must exist, authorizing him to act at all, and that agency is not created by the mere force of the clause under consideration.

2. Independent of this clause in the policy, Anthony was not, in fact, the agent of the plain-

tiffs for any purpose at the time of such notice of cessation of risk. Noyes was the broker employed by plaintiff to *obtain* this insurance. *His agency even, ceased when the policy was issued.* But if this had been otherwise, he had no power of substitution, binding plaintiffs thereby. Anthony was the agent of Noyes, and not of plaintiffs. Plaintiffs had a right to select their own agent, and could not be bound by the acts of one not selected by them. Noyes' agency—if it could be held to have extended to the power to consent to the cancelment of the policy—was one requiring especial skill and judgment, and was peculiarly one of personal confidence.

"*Delegatus non potest delegare.*"

See 1 Potter on Corporations, 179.

One who is to receive a notice so materially affecting his rights, is at least entitled to know who his agent is. If the broker whom he employs may employ one other, thereby constituting him the agent of the principal, he may employ one hundred others, thereby constituting agents *ad libitum* for the insured, by whose discretion or want of it, he must be bound.

Nor is it any answer to this to say that Anthony's name was on the back of the policy. If seen by the plaintiffs (which the evidence shows it was not, see Error Book, fol. 51), it would be notice to them that Anthony was the broker who procured the policy, and if this was a ratification of his agency for that purpose, it was for that purpose only, and surely did not make him plaintiffs' agent to consent to the subsequent cancelment of the risk.

3. Anthony not being the general agent of plaintiffs, nor the special agent for the purpose

of receiving notice of cancelment of the policy, plaintiffs are not bound by such notice given to him. The policy was delivered to him

See Wheeler vs. Ins. Co., 58 1865-1882

The case of the Standard Oil Co. against the Triumph Ins. Co., (64 N.Y. R., 85), has no application here, as that was the case of a *general* agency, as to which see Brueck vs. Phœnix Ins. Co., (21 Hun., 548–549).

II.—Nor does the testimony claimed to establish a custom, charge plaintiffs with this notice to Anthony.

1. If it is proven to be the custom that notice to the agent is notice to the principal, then no notice was, in fact, given to the agent, Anthony, not being such agent.

If it is proven to be the custom that notice to any person procuring the insurance, is notice to the principal, then it is such a custom as cannot be lawfully proven. No custom is competent of proof which binds a person by the acts or admissions of one bearing no relation of agency or privity to such person. It cannot be shown by custom, that in a contract providing for notice between the parties, of a fact affecting the rights of the person to be notified, that such notice may be lawfully given to anybody, not a party to the contract, nor, for the purpose of such notice, standing in any relation of agency or privity with such party.

Such was the custom proven, if any such was established.

2. But none was established. There was no proof showing that, as matter of law, any usage as claimed, was in fact *known to the plaintiffs*, or so general, as to be constructively known to plaintiffs, and such was necessary to be shown.

Bradley vs. Wheeler, 44 N.Y. R., 500.
Higgins vs. Moore, 34 N.Y. R., 425.
Esterly vs. Cole, 3 Com. R., 502.
Dawson vs. Kettle, 4 Hill, 107.
Wheeler vs. Newbould, 5 Duer., 27.
Brueck vs. Phœnix Ins. Co., 21 Hun., 548–549.
Wallis vs. Bailey, 49 N.Y. R., 464.
Berkshire Woolen Co. vs. Proctor, 7 Cush., 417.
Cunningham vs. Fonblanque, 6 C. & P., 44.
Garry vs. Meagher, 33 Alabama, 209.
Chesepeake Bank vs. Swan 29 Md., 483.
Mills vs. Hallock, 3 Edw. Ch., 652.
Haskins vs. Warren, 115 Mass. 514.
Randall vs. Smith, 18 Am. R., 200 and note.
Adams vs. Pittsburgh Ins. Co., 76 Penn. St., 411.
Harris vs. Tunbridge, 83 N.Y. R., 92.
Lawson on Usages and Customs, pp. 23, 48, 52, 55, 63, 89, 97.

In *Fisher vs. Sargent* (10 Cush., 270) and *Werner vs. Dellaway* (4 Metc., 221), the Court held that not only the existence of the usage, but whether knowledge of it exists in any particular case, is a question of fact for a jury, and *Adams vs Pittsburgh Ins. Co.* (*ante*) holds that the custom must be proven with a certainty.

3. The actual authority conferred upon Anthony being proven to have been only to effect the insurance, and not to accept notice after insurance was effected, it was not competent to prove a custom conferring authority upon him not expressly given.

4. Unless the evidence *established a custom*, it was incompetent and should have been ex-

cluded. It was not competent "to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed."

If there was no such custom known to plaintiffs established, then the contract was to be construed without reference to the facts proven. If there was such a custom shown known to the plaintiffs, then there was nothing for the jury to pass upon, but the defence in this respect was made out without reference to the clause in the contract, relied upon by defendant.

The effect of the admission of the testimony was to prejudice the minds of the jury, in determining the question of fact submitted to it.

SECOND.

The exception at folio 57, Error Book, was well taken.

If it was competent to introduce evidence tending to prove a custom that the notice provided in section 8 of the policy could be thereunder given to the broker "to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed," it was equally competent to introduce evidence of a custom that on such notice being given, it became effectual as such, only when a reasonable time had elapsed to enable a re-insurance to be made.

This is not in opposition to the terms of the contract. The offer is to show, that while the means of terminating the risk is by notice, as provided in the

policy, yet that means, by custom, became effectual after a reasonable time for re-insurance. The policy provides the mode of termination, and the custom provides the time when such means go into effect. It is not in any sense in contravention of the terms of the policy to say: You having introduced evidence to show that this notice, which under the contract, irrespective of custom, must be given to the party thereto, by a custom may be given to the person other than the party procuring the insurance, we will show that by the same custom, when such notice is given to such person, it is only intended to be a notice to the insured through his agent, and takes effect only after a reasonable time for such agent to notify the insured.

If this is not so, then the grossest injustice results to the insured.

A broker is employed to obtain a particular insurance. He is not a general agent for that purpose. When such insurance is made, and the policy is delivered to his principal, in fact as to his principal his agency ceases. Yet he, having no authority from the insured to procure insurance in place of that already procured, after cancelment is held by custom, nevertheless, to be the agent of his former principal and to stand as his substitute, to receive a notice which terminates the risk and leaves the principal without insurance. Such a rule is monstrously unjust, but when you add to it, that it is not competent to show as a part and qualification of this custom, that in such a case the notice is not considered to take effect until a reasonable time elapses to allow the principal to be notified, and thereby to enable him to substitute other insurance, what can be said in its defence?

In *McLean vs. The Republic Fire Ins. Co* (3 Lansing, 427) the Court says of such a clause, independent of proof of custom: "When an insurance com-

pany has accepted a risk it is but just to hold that the insured is entitled to reasonable notice of the determination of the company to cancel such risk."

If the law be otherwise than as claimed by us, then under this very general clause in a fire insurance policy, a person insuring through a broker may be ruined without the possibility of avoiding it. The notice may be given to a broker at a time and under circumstances where it will be utterly impossible for him to notify the principal before the property insured may be destroyed. The principal may retire at night supposing himself adequately insured, and arise in the morning a ruined man, because his insurance has ceased by notice necessarily unknown to him.

Any construction of a policy or of a custom which works such result, cannot be law.

In this case, it is much worse than the case stated. as here the notice was given to one not the broker employed by him, but a substitute obtained without his knowledge or authority, at least express. Such person so notified, having no business relations with plaintiffs, and in fact. unknown to them, and who would be called upon to notify the original broker, and not the principal, of the notice given to him, which notice must reach the principal through his broker, thus involving more delay.

A custom is not reasonable which an honest or right minded man would deem to be unfair and unjust.

Randall vs. Smith, 18 Am. R., 207; note and cases cited.

The judgment of the trial Court should be reversed and a new trial ordered.

BRITTON & ELY,
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Attys. for Plffs. in Error.

WINCHESTER BRITTON,
of Counsel.

October, 1883.

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The following are extracts from the Policy of Insurance, being a part of paragraph 9, and the whole of paragraph 11.

9. " In case differences shall arise touching any loss or damage " after proof thereof has been received in due form, the matter " shall, at the written request of either party, be submitted to " impartial arbitrators, whose award in writing shall be binding " on the parties as to the amount of such loss or damage, but " shall not decide the liability of the Company under this Policy; " and further, that it shall be optional with the Company to re- " pair, rebuild or replace the property lost or damaged with " other of like kind and quality within a reasonable time, giving " notice of their intention so to do within thirty days after " receipt of the proofs herein required; and in case this Com- " pany elect to rebuild (or not), the assured shall, if required, " furnish plans and specifications of the buildings (damaged or " destroyed)."

11. " This insurance, the risk not being changed, may be con- " tinued for such further time as shall be agreed on, provided the " premium therefor is paid and endorsed on this Policy, or a " receipt given for the same, and it shall be considered as con- " tinued under the original representation, and for the original " amounts and divisions, unless otherwise specified in writing; " but in case there shall have been any change in the risk, " either within itself or by neighboring buildings, not made " known to the Company by the assured at the time of renewal, " this Policy and renewal shall be void."

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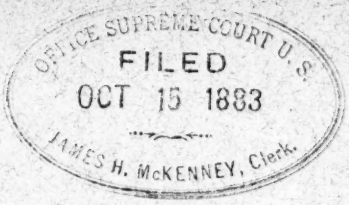

U. S. SUPREME COURT.

WILLIAM R. GRACE, ET AL.,
Plaintiffs in Error,

vs.

THE AMERICAN CENTRAL INSURANCE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE W. PARSONS,
Of Counsel.

Evening Post Job Printing Office, N. Y.

U. S. Supreme Court.

WILLIAM R. GRACE ET AL.,
Plaintiffs in Error,

vs.

THE AMERICAN CENTRAL INSURANCE COMPANY,
Defendant in Error.

Upon Error from the Circuit Court for the Eastern District of New York.

Brief for Defendant in Error.

On the application of Frank H. Anthony, an insurance agent, and an agent of plaintiffs in error, the defendant in error on or about the 26th of September, 1877, by its local agent, John D. Carroll, at Brooklyn, New York, issued and delivered its policy of insurance to said Anthony, by which it agreed to insure certain property of plaintiffs in error, situated in Brooklyn, to the extent of $5,500, for one year from said 26th of September (fols. 3, 43, 44, 46).

The plaintiffs in error had their principal office in New York.

The property insured was lumber, at the yard of said plaintiffs, in Brooklyn, New York (fol. 3).

The principal office of defendant in error was at St. Louis, Missouri.

The parties to the insurance contract never met, nor had any direct correspondence before the fire. All of the business relating to the contract was transacted by the agents of the respective parties, in Brooklyn (fols. 45, 46).

The contract or policy of insurance contained the following provision:

"Sec. 8. *This insurance may be terminated at any time, at the "request of the insured, in which case the company shall retain only "the customary short rates for the time the policy has been in "force. The insurance may also be terminated at any time, at the "option of the company, on giving notice to that effect and refund- "ing a ratable proportion of the premium for the unexpired "term of the policy. It is a part of this contract that any person, "other than the assured, who may have procured this insurance to "be taken by this company, shall be deemed to be the agent of the "insured named in this policy, and not of this company under any "circumstances whatever, or in any transaction relating to this "insurance*" (page 30).

A few days after such delivery of the policy the agent of the defendant gave notice to said agent of plaintiffs that the company would not carry the risk; in effect, that the insurance was cancelled, and plaintiffs' agent accepted the notice and assented, and promised to return the policy to defendant's agent that day. No premium of insurance had been paid (fols. 44, 46, 47, 49).

The facts relating to the cancelment were submitted to the jury, under proper instructions from the court, and they found that the policy was cancelled (fol. 60).

Besides the provision in the policy making Anthony the agent of plaintiffs, there was undisputed parol evidence that he was sole agent and had acted as such on many occasions (fols. 43, 44, 46). The policy is not printed in the record; but it will be seen, by referring to it and to the opinion of the learned circuit judge, that there was a customary endorsement on the policy, which stated that Anthony was the agent who procured the policy (latter part of fol. 64).

Besides the provision in the contract which authorized defendant to deal with such agent in any transaction relating to the insurance, there was undisputed evidence of a custom existing in the place where this contract was made, to give

such notices of cancelment to such agents (fols. 47, 50–51, 52 to 54).

The fire occurred a day or two after the notice of cancelment, and before the policy had been returned to defendant's agent (fols. 48, 49, 55, 56).

Plaintiffs' loss was fully covered by insurance, independent of the policy of defendant (fol. 41).

That this claim is prosecuted in the interest of the insurers is shown by evidence of what the principal plaintiff stated to defendant's general agent, Mulville (fol. 51), to wit: "That "I (Mulville), had better see the other companies in interest, "and if they did not make any claim that he (Grace) should "not."

Grace at the same time stated that if Mulville had called on him, Grace, instead of the agent, "he would have been "glad to have handed me (Mulville) the policy. That he had "never seen the policy, and did not know that he would have "accepted it if he did see it," &c.

POINTS.

First.—As we have shown, the principal place of business of plaintiff in error was in the City of New York; that of defendant in error was at St. Louis, Missouri; and the subject of the insurance was situated at Hunter's Point, in the Eastern District of Brooklyn.

All of the business relating to the insurance was transtacted by the agents of the respective parties; not necessarily so as to the plaintiffs, because the office of the general agents of defendant, Monrose & Mulville, was in the same place in which platntiffs had their office, and plaintiffs also did business in Brooklyn, where the contract was made. But, according to a prevalent custom with large commercial houses in these cities, they committed this business to the charge of agents; and the principals, as was usual, never saw each other in reference to the business transaction.

Second.—If it be suggested that Moyes only was the agent employed by plaintiffs, the answer is that such was not the truth either as matter of fact or of law. While it may be admitted that as matter of form they were in the habit of sending their orders for insurance in the first instance to Moyes the New York agent, still the evidence shows that they kne that he in their behalf constantly employed their Brooklyn agent, Anthony, to procure insurance for them in Brooklyn where the property was situated ; (fol. 43, 44) that he, Anthony, procured very large amounts of insurance for them, and more frequently delivered the policies when procured directly to them, with his endorsement on the policies, showing that he was the agency who procured the insurance, and they ratified his agency by accepting the policies from him with such endorsements on them, and further by accepting this policy with a like endorsement, and containing the provision which distinctly stipulated that he was their agent ; and they retained it, and are now prosecuting this action upon it.

That Anthony was thus constituted the agent of plaintiffs in any transaction relating to this insurance, we submit is too plain a proposition to require discussion, or the citation of authorities.

1 Independent of such direct and positive evidence of the fact of the agency, the law interprets the acts of the parties as constituting an agency.

(*a.*) In Phil. on Ins., sec. 1870, that learned author exhibits authority for announcing as a principle that " If the agent em- " ployed by the principal appoints a sub-agent who is adopted " by the princpal, the sub-agent thereby becomes the direct " representative of the principal."

In Meadowcraft vs. *Insurance Co.*, 61 *Penn St., R.* 91. T effected the insurance, and received a commission from another agent of the company for doing it. *Held*, that T was agent of the company.

See also *Bodine* vs. *Insurance Co.*, 51 *N. Y. R.*

Bergson vs. *Insurance Co.*, 5 *Bennett's Fire Ins. Cases, page* 253.

2. The maxim, *delegatus non potest delegare*, does not apply in such a case, because

(*a.*) The delegation was adopted by the principal; and

(*b.*) The authority was to be implied from the custom and manner of doing the business. (Story's Agency sec. 14).

Third. - Section 8, before quoted (*vide* p. 30 of the Record), provides a mode for the termination of the insurance contract by either party to it. First, it may be done at the request of the assured. Second, it may be "*terminated at any time*, at the option of the company, *on giving notice to that effect*. And in that connection, and as if for the purpose of providing for the very emergency of this case, that section does not say in terms that such notice shall be given to the assured, but it does naturally and properly designate as the person to whom such a notice might be given, the one who procured the insurance.

This notice was certainly a "transaction relating to the insurance."

The jury found that notice was given to that person, and it was accepted; and the contract of insurance was then and there by its express terms terminated. Marshall *Ch. J.*, in Ins. Co. *vs.* Stark, 6 Cranch, 272, says: "In this case the jury find that the above document was made for plaintiff, and this finding establishes the fact." The contract does not speak of any delivering up of the policy, or of any formal cancelment of it. This would often be impracticable.

1. The circumstances of this case exhibit the propriety and fairness of the terms of the contract.

(*a.*) The principal parties to it resided a thousand miles apart. Defendants had a large general agency in New York, where plaintiffs' principal office was, with whom plaintiffs might have transacted this business directly. Plaintiffs also had an agent in New York, through whom they chose to do the business, and who might have done it with those general agents. But their agent, with the knowledge and acquiescence of his principals, employed an agent in the city

where the property was situated, and this sub-agent procured this insurance from a local agent of defendant in the last named city.

Thus, for all purposes connected with this contract of insurnace, by all of the circumstances as well as by the terms of the contract, Anthony became the agent of plaintiffs, and Carroll was the agent of defendant.

And even when the subject of thus terminating the policy was under discussion between General Agent Mulville and plaintiff Grace, the latter did not pretend to repudiate the authority of his agent to cancel the policy, but intimated that the other companies made that point, and he would be glad if they would not insist upon it (fol. 51).

(*b.*) It would hardly be claimed that, if plaintiffs had desired to terminate the insurance, they could not do it by making the request of the agent Carroll, but must go to the defendant in Missouri; nor can it, with any more consistency or reason, be urged that defendants' agent must go past the agent who procured the insurance, and who is thus designated as a proper person to deal with in "*any transaction relating to the insurance*," to another city and give the notice of cancelment to the principal, who is not specifically designated as the person to whom such notice was to be given.

(*c.*) To exhibit the unreasonableness and impracticability of such a rule, we have only to suppose that the assured resided a thousand miles distant from their agents.

2. The whole business having thus been transacted by and through agents, the law properly provides in such cases that "Notice of facts to an agent is constructive notice thereof to "the principal himself, where it arises from, or is at the time "connected with the subject matter of his agency; for, upon "general principles of public policy, it is presumed that the "agent has communicated such facts to his principal; and if "he has not, still the principal, having intrusted the agent "with the particular business, the other party has a right to "deem his acts and knowledge obligatory upon the principal; "otherwise, the neglect of the agent, whether designed or un-

" designed, might operate most injuriously to the rights and " interests of such party."

Vide Story on Agency, sec. 140, *and cases cited.*

In *Standard Oil Co.* v. *Insurance Co.*, 64 *N. Y. R.*, 85, a case quite parallel with that under discussion, it was held that an insurance broker, employed by a party to effect insurance for him, must be regarded as his agent, and may be regarded by the insurer as clothed with full authority to act for his principal in procuring, modifying or canceling policies; and his acts in these respects are binding upon his principal the same as if done by the principal.

See also *Insurance Co.* v. *Mueller* (*Supreme Ct. of Penn.*), 8 *Ins. Law Jour.*, 263.
Armour v. *Ins. Co.*, 47 *N. Y. Superior Ct. R.*, 352.
Bank of U. S. v. *Davis*, 2 *Hill, at* 461, *Nelson, Ch. J.*
McEwen v. *Insurance Company*, 5 *Hill*, 101.
Fulton Bank v. *Canal Co.*, 4 *Paige, at* 137.
Boyd v. *Vanderkemp*, 1 *Barb. Ch.*, 273.

In *Anderson* v. *Coonley*, 21 *Wend.*, 279, *Nelson, Ch. J.*, says: " A general agent entrusted by his principal with power to " make and enter into contracts for the purchase of grain, has " power to modify or waive a contract made by him in respect " to such grain.

" *The authority of an agent being limited to a particular business, does not make it special; it may be as general in regard to that as if its range was unlimited.*"

Vide also *Insurance Company* v. *Insurance Co.*, 66 *N. Y. R.*, 119.

In *Insurance Co.* v. *Stark*, 6 *Cranch.*, 268, *held*, that an agent who makes insurance for his principal, has authority to abandon without formal letter of attorney.

3. It may be remarked that no inconvenience or hardship resulted from the practice in this case. For we have seen that plaintiffs did not need, nor want, the insurance; would not probably have accepted it if their personal attention had been

called to it; and would willingly have given it up on personal application. The agent did not ask for time to effect other insurance (fol. 57, latter part). Besides, if their agent had performed his duty to his principals, and his promise to us, by returning the policy, there was ample time to replace it by other insurance.

The facts that he did not do it, did not ask for time to do it, and that the insurance was more than the loss, independent of the policy in question, lead to an inference that the neglect of the agent arose from his knowledge that such insurance was not needed at that time, for the stock insured varied largely in amount from time to time.

4. The courts have been prompt and rigid in holding that notice to a general, local, or traveling agent of an insurance company is notice to the company, giving it effect even to the extent of causing a waiver of, or avoiding covenants in the contract concluded after such notice or knowledge; it is respectfully submitted that there can be no impropriety in applying the principle to the assured in a reasonably plain case.

Bennett v. *Insurance Co.*, 81 *N. Y. R.*, 273, and the numerous cases cited in respondent's brief, p. 274. *Also*, 79 *N. Y. R.*, 230; 76 *Id.*, 415; 89 *N. Y. R.*, 315; 83 *Id.*, 133; 61 *Penn.*, 91. Wood on Ins., sec. 406 and cases cited in note.

The decisions in the Federal and State courts are uniform in this respect, but we forbear multiplying citations.

Fourth.—But we are not dependent altogether upon even the well settled principles of law thus briefly discussed.

There was uncontradicted and satisfactory evidence given on the trial that an established and well known custom existed in the place where this contract was made, to give the notice of cancelment, in such cases, to the agent. The usage is entirely in harmony with the terms of the contract. But even if the contract had been silent on that subject, the law would

hold that the parties must have contracted in reference to such custom, which indeed should be taken to be a part of the contract.

1. Judge Story expresses the principle in such clear language that we may be pardoned one or two brief quotations. In sec. 77 (Story on Agency) he says: "In the first place, the "usages of a particular trade or business, or of a particular "class of agents, are properly admissible; not, indeed, for the "purpose of enlarging the powers of the agents employed "therein, but for the purpose of interpreting those powers "which are actually given; for the means ordinarily used to "execute the authority are included in the power," &c.

In sec. 96 he says: "The known usage of a trade and busi- "ness often becomes the true exponent of the nature and ex- "tent of an implied authority; for, in all cases, where such "usages exists, and an agency is to be exercised touching such "matters, the natural presumption in the absence of all coun- "tervailing proofs, is that the agency is to be conducted in the "manner and according to the practices which are allowed "and justified by such usages."

Again, in sec. 106 the same learned author says: "By far "the largest portion of incidental power is deduced from the "particular bnsiness, employment or character of the agents "themselves. *Whatever acts are usually done by such classes of "agents, whatever duties are usually attached to them; all such "acts, rights and duties are deemed to be incidents of the authority "confided to them in their particular business, employment or "character*," &c.

2. Parsons on Contracts, p. 52, thus states the law of custom: "And althongh doubts have been expressed whether it "was wise or safe to permit express contracts to be controlled, "or, if not controlled, affected by custom in the degree in "which it seems now to be established that they may be; "this operation of custom is now fixed by law, and extended "to a vast variety of contracts; and, indeed, to all to which "its privileges properly apply. And qualified and guarded "as it is, it seems to be no more than reasonable. In fact it "may be doubted whether a large portion of the common law

" of England and of this country rests upon any other basis " than custom."

3. And in *Hinton* v. *Locke*, 5 *Hill*, 437, Bronson, Justice, clearly states the principle and its application as follows: " Usage can never be set up in contravention of the contract; " but when there is nothing in the agreement to exclude the " inference, the parties are always presumed to contract in ref- " erence to the usage or custom which prevails in the partic- " ular trade or business to which the contract relates." In that case plaintiff was to be paid twelve shillings per day for his workmen, but the contract was silent as to the number of hours that should constitute a working day; and that learned judge said: "Evidence of the usage or custom was let in to " answer that question."

4. So we say in reference to the case at bar: the policy did not say to whom the insurer should give the notice of cancelment, whether to the assured personally or to the agent who had, in behalf of the principal transacted all of the business relating to the insurance; and the law, therefore, permitted evidence of the custom to give the notice to such agent.

5. As was said in the case of *McPherson* v. *Cox*, 86 *N. Y. R.*, *at p.* 476, " we submit that there were no words of exclusion, " hence the contract will be held to have been framed in ref- " erence to the custom."

6. So in *Duncan* v. *Hill*, 19 *W. R.*, 894, it was held that where an agent is employed by a principal to deal in a market, the usages and customs of that market are imported into and become a part of the contract.

7. And says 3 Kent. Com., p. 389: "Policies of insurance are construed according to the usages of trade."

8. Says Lawson on Usages and Customs, sec. 24: " If there is " a general usage applicable to a particular profession or busi- " ness, parties employing an individual in that profession are " supposed to deal with him according to that usage. All

"trades have their usages, and when a contract is made with "a man about the business of his craft, it is framed on the "basis of its usage, which becomes part of it, except when its "place is occupied by particular stipulations." Citing cases in notes.

Authorities might be cited indefinitely, but the principle is familiar.

9. In conclusion, it may be remarked that in such cities as New York and Brooklyn, it would be quite impracticable to do this business with such large insurers, except in the manner in which this was done. Mutual convenience established the custom, and it was uniform and well known.

Fifth.—But it will be suggested that it was error to exclude the offer to prove a custom that the notice of termination "does not take effect until a reasonable time has elapsed to "enable insured to reinsure" (p. 25).

The suggestion is without force. The language of the contract is plain: "The insurance may also be terminated at *any* "*time*, at the option of the company, on giving notice to that "effect," &c. (fol. 65). But the offer was to prove that by custom the insurance could not be terminated at *any time* on giving notice to that effect; that it could not be terminated until a reasonable, indefinite time had elapsed after the notice to enable the insured to reinsure. The offer was vague and indefinite. If anything intelligible could be made of it, it was an offer to contradict, by parol evidence, the express terms of the contract. The offer was in direct violation of the plain, express rules on that subject.

1. Besides, we remark that there was no pretence that there was not ample time, after the notice was given and before the fire, to replace the insurance; hence the evidence offered was immaterial.

2 Parsons on Con., p. 58, puts the principle in terse language: "Hence, in the interpretation of contracts, it is "an established rule that no custom can be admitted which "the parties have seen fit expressly to exclude; * * * and

"not only is a custom inadmissible which the parties have "already excluded, but it is equally so if the parties have ex- "cluded it by necessary implication; as by providing that the "thing which custom affects shall be done in a different way."

Same, 2 *Phil. Ev.* (*4th Am. Ed.*), 797.

(*a.*) We remark in this connection that the offer was too general and indefinite. It might well be that under a different form of policy evidence of such a custom would be admissible. The offer was not to show that under this plain, explicit form of policy such a custom existed.

2. But a usage cannot be incorporated into a contract which is inconsistent with its terms.

3. Usages must be reasonable, and whether it is reasonable or not is a question of law (1 Duer on Insurance, §§ 63, 64), and this usage would manifestly be unreasonable and impracticable, leaving parties always to contend with a difficult question of fact, depending in each case upon many circumstances. In the case of the *Schooner Reeside*, 2 *Sumner.*, 567, it was attempted to vary the common bill of lading, by which goods were to be delivered in good order and condition, *the danger of the seas only excepted*, by showing a custom, that the owners of packet vessels between New York and Boston, should be liable only for damage to goods occasioned by their own neglect. But Story, *J.*, held, that "the true and appropriate office of a "usage or custom is, to interpret the otherwise indeterminate "intentions of parties, and to ascertain the value and extent of "their contracts, arising not from *express stipulations*, but from "mere implications and presumptions, and acts of a doubtful "or equivocal character. * * * But I apprehend that it "can never be proper to resort to any usage or custom to "control or vary the positive stipulations in a written con- "tract, and *a fortiori*, not in order to contradict them. An "express contract of the parties is always admissible to super- "sede, or vary, or control, a usage or custom; for the latter "may always be waived at the will of the parties. But a "written and express contract cannot be controlled, or varied, "or contradicted by a usage or custom; for that would not "only be to admit parol evidence to control or contradict

" written contracts, but it would be to allow mere presump-
" tions and implications, properly arising in the absence of
" any positive expressions of intention to control, vary or con-
" tradict the most formal and deliberate written declarations
" of the parties.

" The rule for admitting evidence of usage must be taken
" always with this qualification, that the evidence proposed is
" not repugnant to, or inconsistent with, the written contract.
" It ought never to be allowed to vary or contradict the written
" instrument, either expressly or by implication. * * *
" Usage may be admissible to explain what is doubtful, but it
" is never admissible to contradict what is plain" (see cases cited in note).

2 *Phil. Ev.* (*4th Am. Ed.*), 798.
Also Blachett v. *Royal Exch. Assce. Co.*, 2 *Cr. and Jer.*, 244.
Hinton v. *Lock*, 5 *Hill*, 437, *supra.*
Grant v. *Maddox*, 15 *M. and W.*, 737.
Yates v. *Pyne*, 6 *Taunt.*, 446.
Keener v. *Bank of United States*, 2 *Barr*, 237.
Sweet v. *Jenkins*, 1 *Rhode Island*, 147.

In *Mumford* v. *Hallett*, 1 *John. R.*, 439, per Livingstone, *J.*, it is held that parol evidence is inadmissible to prove a usage varying the application of plain terms in a policy when there is no sort of ambiguity. To same effect is—

Rankin v. *Insurance Co.*, 1 *Hall* (*N. Y.*), 619,

which adds "or to add conditions or limitations which the terms used plainly exclude."

Vide, also, *Partridge* v. *Life Insurance Co.*, 1 *Dill.*, 139.
Barnard v. *Kellogg*, 10 *Wall.*, 383.
Steinbach v. *Insurance Co.*, 13 *Wall.*, 183.
Blackett v. *Assurance Co.*, 2 *Cr. and Jer.*, 244.
Rogers v. *Insurance Co.*, 1 *Story's R.*, 603.
Winnesheik Ins. Co. v. *Holzrafe*, 53 *Ill.*, 516.

Sixth.—One or two exceptions, taken on the part of plaintiffs, remain to be noticed:

1. The request to charge the jury that there was no evidence to justify a finding that defendant's agent conveyed to plaintiff's agent a knowledge of the cancelment (fol. 61), is disposed of by the fact that the court had already properly charged the jury on that subject (fol. 60).

2. The exception to the refusal to submit to the jury a question whether any custom had been proven, is rather vague; but as there was no evidence relating to any custom, except that of giving notice to the agent, the answer to that exception is that there was ample and uncontradicted evidence of the existence of the custom, and thus there was presented only a question for the court.

3. By the exception to the refusal of the court to charge that there was no evidence that the policy was ever canceled by defendant, it is apparent that plaintiffs' counsel fell into the error of assuming that the *policy* itself must be canceled before the insurance could be terminated. But the policy is only evidence of the terms of the contract, one of which terms provided "that the *insurance* may be terminated "at any time," &c. The court very properly held, that "it was "not necessary that the policy be returned in order to effect a "cancelment of the contract" (fol. 60).

(*a.*) If that was not the correct view, then the insurer would have no power to terminate the risk without the consent of the policy holder.

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